

STATE OF MICHIGAN
IN THE SUPREME COURT

SUE H. APSEY and ROBERT APSEY, JR.,

No. _____

Plaintiffs-Appellees
and Cross-Appellants,

Court of Appeals
Docket No. 251110

vs.

MEMORIAL HOSPITAL, d/b/a MEMORIAL
HEALTHCARE CENTER, RUSSELL H. TOBE, D.O.,
JAMES H. DEERING, D.O., JAMES H. DEERING,
D.O., P.C., and SHIAWASSEE RADIOLOGY CON-
SULTANTS, P.C.,

Shiawassee Circuit Court
Court No. 01-007289-NH

Defendants-Appellants
and Cross-Appellees.

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AUG 18 2005

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MICHIGAN SUPREME COURT

NOTICE OF HEARING

**MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF
ON BEHALF OF THE STATE BAR OF MICHIGAN NEGLIGENCE SECTION
AND THE STATE BAR OF MICHIGAN ELDER LAW SECTION**

AFFIDAVIT OF DAVID R. PARKER

**BRIEF *AMICI CURIAE* ON BEHALF OF
THE STATE BAR OF MICHIGAN NEGLIGENCE SECTION
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PROOF OF SERVICE

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NOTICE OF HEARING

TO: ALL COUNSEL AND PARTIES OF RECORD

PLEASE TAKE NOTICE that the attached Motion to File *Amici Curiae* Brief shall be heard on Tuesday, August 30, 2005, or as soon thereafter as it may be heard.

CHAREFOOS & CHRISTENSEN, P.C.

By: _____

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**MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF
ON BEHALF OF THE STATE BAR OF MICHIGAN NEGLIGENCE SECTION
AND THE STATE BAR OF MICHIGAN ELDER LAW SECTION**

The State Bar of Michigan Negligence Section and The State Bar of Michigan
Elder Law Section, by and through their attorneys, CHARFOOS & CHRISTENSEN, P.C., hereby

move this Court for leave to file a brief as *amicus curiae* in the matter of *Apsey v Memorial Hospital, et al*, and states the following in support of its motion:

1. The State Bar of Michigan Negligence Section is a division of the State Bar of Michigan whose purpose is to represent lawyers and enhance the practice of law in the State of Michigan. An important purpose of the Association is to represent and protect the interests of its members by filing *amicus curiae* briefs in cases involving important issues of concern to its members.

2. The State Bar of Michigan Elder Law Section is a division of the State Bar of Michigan whose purpose is to represent lawyers and enhance the practice of law in the State of Michigan. An important purpose of the Association is to represent and protect the interests of its members by filing *amicus curiae* briefs in cases involving important issues of concern to its members.

3. The issues in this case are important to the jurisprudence of the State, and their resolution is likely to have a direct and substantial fiscal impact on the members of the State Bar of Michigan Negligence Section, and the State Bar of Michigan Elder Law Section.

4. This brief of *amici curiae* is being filed at the same time as the party whose position is being espoused, that of Plaintiffs-Appellees/Cross-Appellants, in support of their cross-appeal. MCR 7.306(D).

5. As friends of the Court, and not having been previously involved in the litigation, the *amici curiae* will be able to bring a different, and broader, perspective to the Court than the parties, which will assist the Court in deciding this matter.

WHEREFORE, the *amici curiae* State Bar of Michigan Negligence Section and State Bar of Michigan Elder Law Section request that this Honorable Court enter an order granting *amici curiae*'s Motion for Leave to File *Amici Curiae* Brief, accept for filing *amici curiae*'s Brief submitted with this Motion, and grant such additional relief as the Court deems just and equitable.

CHARFOOS & CHRISTENSEN, P.C.

By: _____



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AFFIDAVIT OF DAVID R. PARKER

STATE OF MICHIGAN)
) SS.
COUNTY OF WAYNE)

DAVID R. PARKER, being duly sworn, deposes and states:

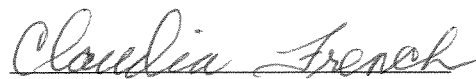
1. I am the attorney for *amici curiae* in the above-entitled cause of action.

2. I have read the foregoing Motion by me subscribed, and the facts set forth therein are true, to the best of my knowledge and belief.



DAVID R. PARKER

Subscribed and sworn to before me
on August 14, 2005.



Notary Public, Wayne County, MI
My commission expires:

CLAUDIA M. FRENCH
NOTARY PUBLIC, STATE OF MI
COUNTY OF WAYNE
MY COMMISSION EXPIRES Nov 9, 2011
ACTING IN COUNTY OF

STATE OF MICHIGAN
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STATEMENT OF BASIS OF JURISDICTION

This motion and accompanying brief are being filed within the time limit under MCL 7.306(D) of the party whose position is being advocated, namely, in this case, Plaintiffs-Appellees/Cross-Appellants.

STATEMENT OF QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS ERR IN DETERMINING THAT MCL 600.2102 TRUMPS THE UNIFORM RECOGNITION OF ACKNOWLEDGEMENTS ACT, MCL 565.261, *ET SEQ*, INASMUCH AS THE URAA WAS ENACTED AS AN ADDITIONAL MEANS OF PROVING THE VALIDITY OF NOTARY SIGNATURES?**

Plaintiffs-Appellees answer “Yes.”

Defendants-Appellants answer “No.”

The Court of Appeals answered “No.”

Amici Curiae answer “Yes.”

- II. DID THE COURT OF APPEALS ERR IN REVITALIZING AN ARCHAIC PRACTICE WHICH HAS NOT BEEN PART OF THE AFFIDAVIT PRACTICE OF LAW IN THIS STATE, IN ANY AREA OF ENDEAVOR, FOR DECADES?**

Plaintiffs-Appellees answer “Yes.”

Defendants-Appellants answer “No.”

The Court of Appeals answered “No.”

Amici Curiae answer “Yes.”

STATEMENT OF FACTS

Amici Curiae, State Bar of Michigan Negligence Law Section and State Bar of Michigan Elder Law Section, accept the Statement of Facts asserted by Plaintiffs-Appellees/Cross-Appellants.

DESCRIPTION OF THE *AMICI CURIAE*

The Negligence Section of the State Bar of Michigan is a section of the State Bar of Michigan. It is composed of Michigan lawyers interested in issues related to negligence litigation, including the medical malpractice area which is implicated by this panel's decision. Its composition includes members in roughly equal proportion who represent plaintiffs in negligence litigation, and those who represent defendants. The Section provides educational programs for its members, as well as for the public at large. Any member of the State Bar of Michigan is eligible for membership in the Negligence Section.

The Elder Law Section of the State Bar of Michigan is also a section of the State Bar of Michigan. As is the negligence section, it is composed of Michigan lawyers, except that the lawyers of the Elder Law Section are those who regularly practice, or are interested in, issues which arise in litigation for the benefit of, or in furthering the interests of, the elderly in Michigan. As is true of the Negligence Section, its composition includes members who represent both plaintiffs and defendants in litigation. The affidavits involved, which may be called into question by the *Apsey* decision, are from out-of-state relatives, heirs, guardians, etc., as well as for other litigation, such as divorce and family law, personal injury litigation, etc. This Section provides educational programs for its members, as well as for the public at large. As is true of the Negligence Section, any member of the State Bar of Michigan is eligible for membership in the Elder Law Section.

INTRODUCTION

The case at bar presents two opinions by the Court of Appeals which wrongly interpret the requirements placed upon one who makes use of an affidavit from an out-of-state affiant. Although the second *Apsey* opinion, discussed in more detail below, “solves the problem” as far as pending cases are concerned, it leaves an incorrect, and overly technical, burden upon practicing lawyers, such as the members of the *Amici* group herein, who regularly need to present affidavits from individuals in other states in support of various activities. The only correct legal action in this case is that which removes this burden, as intended by the Legislature, as shown by the plain language of the Uniform Recognition of Acknowledgements Act, MCL 565.261, *et seq.*

THE FIRST APSEY OPINION

In *Apsey v Memorial Hospital*, Docket No. 251110, decided April 19, 2005 (Exhibit A) (hereinafter “*Apsey I*”), Plaintiffs brought a medical malpractice suit, and, in accordance with MCLA 600.2912d, provided an affidavit of merit from an expert located in Pennsylvania. The Pennsylvania expert’s affidavit was sworn before a notary of the State of Pennsylvania. The Court of Appeal acknowledged that “Plaintiffs’ affidavit of merit bears the signature and notary seal of a Pennsylvania notary public. This status in another state carries over to this state, and the signature and title are *prima facie* evidence of authenticity, MCL 565.263(4).” (Exhibit A, at 2)

However, the Court of Appeals then went on to hold that:

“ . . . we find that the more specific requirements of MCL 600.2102, of the Revised Judicature Act, control over the general requirements of MCL 565.272, of the Uniform Recognition of Acknowledgements Act. See *Gebhardt, supra*, at 542-543. In other words, MCL 565.262 governs notarial acts, including the execution of affidavits, in general, to which MCL 600.2102 adds a special certification requirement when the affidavit is to be read, meaning officially received and considered by the judiciary. This special certification requirement of MCL 600.2102 is not diminished or invalidated by the subsequently enacted URAA. See MCL 565.262. As such, the trial court correctly regarded the special certification as a necessary part of the affidavit submitted, and correctly dismissed the case for lack of timely submission of that certification.

(*Id.*, at 3)

THE SECOND APSEY OPINION

In *Apsey v Memorial Hospital*, Docket No. 251110, on reconsideration, June 9, 2005 (Exhibit B) (hereinafter “*Apsey II*”), the Court of Appeals, by a 2-1 decision, reaffirmed “that the more specific requirements of MCL 600.2102 of the Revised Judicature Act control over the general requirements of MCL 265 of the URAA.” (*Id.*, at 5) However, the majority, basing its decision in part upon *amicus* briefs filed this organization, and others, ruled that the decision would have prospective application only (*Id.*, at 7). This meant that Plaintiff Apsey’s case would be reinstated, and that the trial court order granting defendant’s motion for summary disposition would be reversed, allowing plaintiff’s claim to proceed in order to best serve justice and equity. The court went on to rule that:

With regard to all medical malpractice cases pending where plaintiffs are not in compliance with MCL 600.2102(4), on the basis of justice and equity, plaintiffs can come into compliance by filing the proper certification. But justice and equity also dictates a strict application from the date of this opinion. From the date of the issuance of this opinion, any affidavit of merit acknowledged by an out of state notary filed without the proper certification will not toll the statute of limitations because the legal community is now on notice.

(*Id.*, at 8)

Judge Cavanaugh filed a dissent, and would have reversed the original decision, and concluded that the affidavit of merit filed in this matter is sufficient to meet the requirements of MCL 600.2912d(1). The heart of Judge Cavanaugh's decision is as follows:

The URAA, however, explicitly states that it is "an additional method of proving notarial acts." MCL 565.268. and, MCL 565.263(4) provides that the signature and title of the notary public are prima facie evidence that he or she is a notary public and that his or her signature is genuine. That is, it is another method of proving that a notary public actually notarized the document and it does not require a clerk of a court to perform the authenticating function. The majority's reliance on and interpretation of the sentence "Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state," found in MCL 565.268 is misguided. The key phrase in that sentence is "the recognition accorded to notarial acts." Reasonably interpreted, the sentence does not eviscerate the effect of the URAA or buttress the applicability of MCL 600.2102. That is, rather than decreasing or limiting the recognition accorded notarial acts, the URAA broadens the recognition accorded to notarial acts. The majority's reasoning also creates a double standard with respect to affidavits that will be read in judicial proceedings versus those that will not. This seems to create logistical problems in that affidavits typically have the potential of ending up in a judicial proceeding, sometimes years after the notarial act was performed, although litigation was not anticipated at the time the affidavit was notarized.

Further, contrary to the majority's claim, my interpretation of the harmonious nature of the URAA and MCL 600.2102 does not "clearly diminish the requirements of MCL 600.2102." Although it is apparent that the simple method of authentication permitted by the URAA likely makes obsolete the certification method provided by MCL 600.2102, it is still an alternative method of verifying the authenticity of notarial acts. We may not question the wisdom of a statute or inquire as to the methods of the Legislature.

(*Id.*, at Dissent, p. 2)

ARGUMENT

I

THE COURT OF APPEALS RULINGS IN *APSEY I* AND *APSEY II* ARE BOTH INCORRECT IN HOLDING THAT MCL 600.2102 TRUMPS THE UNIFORM RECOGNITION OF ACKNOWLEDGEMENTS ACT, MCL 565.261, *ET SEQ.*

The State Bar of Michigan Negligence Section and the State Bar of Michigan Elder Law Section, as *amici curiae*, submit this Brief to this Honorable Court so as to present solid legal reasons to persuade this Honorable Court to review the Court of Appeals rulings in *Apsey I* and *Apsey II*, and reach the correct result: that affidavits notarized in accordance with Uniform Recognition of Acknowledgements Act, MCL 565.261, *et seq*, need not also be certified pursuant to MCL 600.2102 in order to pass muster in Michigan judicial proceedings.

A. The Statutes Should Have Been Read In Harmony, Rather As Conflicting, Pursuant To Controlling Rules Of Statutory Interpretation.

The *Apsey* opinions went astray by failing to follow principles of statutory construction in its attempt to reconcile the two statutes. The first and preeminent principle of statutory construction is that the court should not look beyond the plain language of the Act itself for interpretation of the legislature's intent, where the language of the statute is clear, unambiguous and capable of interpretation on its own terms. "We must give the words of a statute their plain and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the legislature's intent." *DiBenedetto v West Shore Hospital*, 461 Mich 394, 402; 605 NW2d 300 (2000).

The most crucial misstep in both *Apsey* opinions is found at p. 3 of *Apsey I*. The opinion correctly notes that statutes having a common purpose must be read in harmony in order to

further that purpose. *Jennings v Southwood*, 446 Mich 125, 136-37; 521 NW2d 230 (1994); *Antrim County Treasurer v State*, 263 Mich App 474, 481; 688 NW2d 840 (2004). However, the opinion then makes the mistake of citing *Gebhardt v O'Rourke*, 444 Mich 535, 542-43; 510 NW2d 900 (1994), for the proposition that “when a specific statutory provision differs from a general one, the specific one controls.”

In order to apply the *Gebhardt* rule of statutory construction, there must first be a conflict between the specific and the general provisions of the statutory scheme. For instance, in *Gebhardt* itself, the two statutes in question were MCL 600.5838, and MCL 600.5805, which both set forth definitions of when a cause of action accrues. Section 5805 would have allowed the plaintiff to bring his legal malpractice action within two years of the final judgment of acquittal, one of the prerequisites to showing that legal malpractice occurred. Under this view, plaintiff's claim was timely—as found by the Court of Appeals in its opinion, at 195 Mich App 506; 491 NW2d 249 (1992). Under § 5838, however, as found to be controlling by this Court, legal malpractice actions had to have been brought two years from the last date of professional service, regardless of when the plaintiff discovers or otherwise has knowledge of the claim. Because plaintiff discovered the malpractice claim several years before the final judgment of acquittal was entered, and because the attorney defendant in *Gebhardt* ceased providing professional services much earlier as well, under 5838, as found by this Court, plaintiff's claim was not timely.

The point in *Gebhardt* is that it there could not be two definitions setting forth at which point the statute of limitations began to run; it had to have been one or the other. This is the difference between the *Gebhardt* case and the instant one. This is why the *Gebhardt* ruling has no place in the instant one. In this case, it can be both—and in fact, the Legislature has specifically chosen that it is to be both, as set forth in the plain language of the URAA.

A court faced with potentially conflicting statutes must “endeavor to read them harmoniously and to give both statutes a reasonable effect.” *House Speaker v State Administrative Bd*, 441 Mich 547, 568; 495 NW2d 539 (1993); *People v Webb*, 458 Mich 265, 273-274; 580 NW2d 884 (1998); *Wayne County Prosecutor v Dept of Corrections*, 451 Mich 569, 577; 548 NW2d 900 (1996) (“When this Court can construe statutes, claimed to be in conflict, harmoniously, it must do so. . . .”) Thus, the court’s first responsibility in this case was to find a basis for construing § 2102 and the URAA in a consistent manner. The Court of Appeals failed to do so in its April 19, 2005, decision.

The *Apsey II* majority continued along this path of error by citing only the third sentence of MCL 565.268: “Nothing in this Act diminishes or invalidates the recognition accorded to notarial acts by other laws of this State.” In point of fact, in order to harmonize URAA with 600.2102, the second sentence is actually that which controls: “This Act provides an additional method of proving notarial acts.” Because there is no provision in MCL 600.2102 clearly establishing that it is to be the exclusive method of proving notarial acts, the sections can be read in harmony by allowing either to be done.

Amici believe that this settles the issue in its entirety. The plain language of 565.268 clearly states that, for those choosing to do so, the requirements of MCL 600.2102 can continue to be met. However, in a clear exercise of its authority, the legislature enacted a second statute to provide an additional means of proving notarial acts. Those who choose the second method are not to be punished, despite the clear language of 565.268, by failing to comport with 600.2102. Otherwise, the word “additional” in the statute becomes nugatory and must be read out of the statute in order to harmonize it with the older statute, § 2102. This, of course, cannot be done, without running afoul of another fundamental rule of statutory construction, that every word of a statute must be given meaning. *Pittsfield Charter Twp v Washtenaw County*, 468 Mich 702; 664 NW2d 193 (2003).

Thus, it was not appropriate to resort to selective rules of construction governing situations where statutes are in conflict, such as giving the terms of a specific statute priority over a more general statute, or interpreting a statute based upon editorial decisions of its placement in the compiled laws, where the statutes can be harmonized. The *Apsey* opinions reached the incorrect conclusion as a direct result of their erroneous assumption of conflict between the statutes.

The opinions also omitted other language of the URAA incompatible with the conclusion reached in the opinion. For instance, at p. 3 of the *Apsey I* opinion, the opinion employs ellipses in quoting MCL 565.262(a). The full sentence reads as follows:

For the purposes of this Act, “notarial acts” means acts which the laws of this State authorize notary publics of this state to perform, including the administering of oaths and affirmations, taking proof of execution and acknowledgement of instruments, and attesting documents. Notarial acts may be performed outside this State for use in this State with the same effect as if performed by a notary public of this State by the following persons authorized pursuant to the laws and regulations of other governments in addition to any other person authorized by the laws of this State. [Types of people omitted.]

Thus, “notarial acts” are specifically defined as including the taking of oaths and executions—precisely what is involved in attesting to an affidavit—and that all-important sentence affirming that notarial acts may be performed outside this State “for use in this State with the same effect as if performed by a notary public of this State.” The full sentence shows that the URAA was enacted for the same specific purpose as § 2102 with respect to the judicial reception and recognition of an affidavit notarized outside of Michigan. The *Apsey II* majority finding that § 2102 took priority over the URAA on this basis, because it referred specifically to the use of affidavit for this purpose, is contradicted by the clear fact that the URAA is no less specific in declaring that any out-of-state notarial act is to be “used” in this State, without limitation—and using an affidavit in a judicial proceeding is one of the principal uses of such notarial acts—just the same as a notarial act in Michigan would be. As an affidavit of merit executed before a Michigan notary public need not be

certified to be “used” by a plaintiff to comply with MCL 600.2912d, *see* former MCL 55.113, now MCL 55.307, the URAA specifically directs that an affidavit of merit sworn before an out-of-state notary also be “used” for this purpose without certification.

The *Apsey II* majority also failed to give appropriate deference to the fact that the URAA was a later enacted statute, intended to establish a uniform scheme to occupy an entire field. The statute is to be interpreted as such. Consistently, in interpreting the Uniform Commercial Code, this Court has understood that such is to be liberally construed and applied to promote the Code’s underlying purposes and policies, one of which is to promote consistency among the various states and to further coherence in the business law of the entire nation. *NBD Sandusky Bank v Ritter*, 437 Mich 354, 360; 471 NW2d 340 (1991); *NBD Bank NA v Timberjack, Inc*, 208 Mich App 153, 156-57; 527 NW2d 50 (1994).

The *Apsey II* majority further stated that “the legislature is charged with knowledge of existing laws on the same subject and is presumed to have considered the effect of new laws on all existing laws.” (Exhibit B, at 3.) Yet that is exactly what the legislature did in enacting the uniform act, and in specifically including sentence 2 of MCL 565.268 to the effect that “this Act provides an additional method of proving notarial acts.” It was error to interpret the URAA and 600.2102 as being in conflict, while ignoring the import of that sentence.

An existing statute may be held to be impliedly repealed in two instances: “(1) when it is clear that a subsequent legislative act conflicts with a prior act, or (2) when a subsequent act of the legislature clearly is intended to occupy the entire field covered by a prior enactment.” *House Speaker, supra*, at 563; *Donajkowski v Alpena Power Co*, 460 Mich 243, 253; 596 NW2d 574 (1999); *Wayne County Prosecutor, supra*, at 576; *City of Kalamazoo v KTS Industries, Inc*, 263 Mich App 23, 36-37; 689 NW2d 319 (2004)

Both prongs apply. The URAA is the more recently-enacted statute. *City of Kalamazoo, supra*. Further, the Commissioners, in their Prefatory Note, indicated that prior statutes need not be repealed, precisely because the URAA was “in addition to” those previous provisions (Exhibit C). Michigan courts have recognized that where the Michigan legislature adopts a uniform act, the Commissioners’ commentary accompanying that uniform act is entitled to considerable weight in assessing the intent of the Michigan legislature. *See, Miller v State Farm Insurance*, 410 Mich 538, 557-560; 302 NW2d 537 (1981); *Struble v DAIIE*, 86 Mich App 245, 251-252; 272 NW2d 617 (1978).

In other words, the legislature clearly intended that other means, preexisting the enactment of the URAA, of proving notarial acts, were to be allowed to continue. However, the Legislature clearly did not intend to enact a statute, while at the same time rendering one of its means of proving a notarial act invalid *ab initio*. Such a strained interpretation cannot be permitted to stand.

Thus, the *Apsey II* majority incorrectly disregarded the full legislative and judicial history of the two Acts involved, in finding them to be in conflict, rather than capable of being harmonized. Of course, 600.2102 hails from a century when the authority of notaries to take oaths was not firmly established in every state or territory (those territories at the time being all those places west of the Mississippi), and when Michigan courts deemed themselves unable to take judicial notice of the laws of other states. The URAA, in contrast, evolved from a series of earlier 20th century enactments recognizing that such local restrictions and parochial prejudices regarding notarial acts stifled commerce and transactions between persons in different jurisdictions.

Undue emphasis was also placed upon the location of the URAA in our compiled laws in a chapter relating to property transfers rendered it ineffectual to trump the “evidentiary” scope of 600.2102. The *Apsey II* majority failed to acknowledge that earlier Supreme Court cases

holding that predecessor enactments to the URAA did, in fact, have the effect of negating the certification requirements of this “evidentiary” Act. *See, e.g., Reid v Rylander*, 270 Mich 263, 268; 258 NW 630 (1935); *Sipes v McGhee*, 316 Mich 614, 621; 25 NW2d 638 (1947), *rev’d on other* *grs., Shelley v Kreman*, 334 US 1 (1948); with respect to out-of-state notarized documents filed in judicial proceedings.

Because the Michigan legislature voted to approve the *text* of the URAA, not its placement in the Michigan Compiled Laws, the conclusion that the placement of the uniform act could limit the reach of the statute is completely erroneous. Such was previously recognized this fact in *People v Switras*, 217 Mich App 142, 146; 550 NW2d 842 (1996), when it ruled that “the legislature has not delegated to . . . the compiler [of Michigan laws] the power to affect the application and reach of any statute.” *See also, Moochesh v Dept of Treasury*, 195 Mich App 551, 567; 492 NW2d 246 (1992) (“That the compilers of the law have placed a portion of 1988 P.A. 516 in the tax code and another portion in the lottery regulations is not dispositive.”)

Any reliance on the position of the URAA, as opposed to its text, violates what is perhaps the most fundamental principle of statutory interpretation. Repeatedly in recent years, this Court has emphasized a rigorously textual approach to the interpretation of statutes. This Court has admonished that where the *text* of a statute is unambiguous, “judicial construction is not permitted and the statute must be enforced as written.” *Robertson v DaimlerChrysler*, 465 Mich 732, 748; 641 NW2d 567 (2002). Thus, this Court has stressed that “courts simply lack the authority to venture beyond the unambiguous *text* of a statute.” *Koontz v Ameritech Services*, 466 Mich 304, 312; 645 NW2d 34 (2002) (emphasis added). Similarly, this Court has held that “courts may not speculate about an unstated [legislative] purpose where the unambiguous *text* plainly reflects the intent of the legislature.” *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (emphasis added).

The fact that the URAA is located as it is in our compiled laws makes it no less a statute pertaining to evidence than § 2102. Again, we refer the Court to Section 8, and its plain statement that this Act is intended to provide an additional method of “proving” a notarial act. There are numerous statutes throughout Michigan’s compiled laws that pertain to evidentiary matters not found huddled in Chapter 21 of the RJA.

B. Other Sources Of Law Preclude MCL 600.2102 From Being Given Preclusive Effect.

The *Apsey II* majority further erred in not looking beyond the statutes for guidance. The panel identified § 2102 as serving as a rule of evidence because it is located in the “evidence” chapter of the RJA. Having so discerned this fact, the panel did not give any consideration to what effect today’s court rules and the promulgated Michigan Rules of Evidence might have upon this pre-Civil War statutory rule of evidence. Under MCR 2.113, for example, all that is required of an affidavit is that it be “verified by oath or affirmation.” There is no requirement in our court rules or rules of evidence that this verification itself be certified. Under MRE 202, the courts may take judicial notice of the statutes of other states, such as those authorizing a notary public to take an oath and those making the title and signature of the notary presumptive or *prima facie* evidence of that authority and the genuineness of the signature. Michigan’s Rules of Evidence provide alternative methods of authenticating the acts of officials of other states performed in their official capacity and not requiring any certification of such acts. *See*, MRE 902.

Completely absent from the *Apsey* decision is any recognition of the constitutional problems inherent in enforcing § 2102. This statute sets a different standard for receiving affidavits executed in another state in a judicial proceeding than that applied to an affidavit executed before a notary in Michigan. In so doing, § 2102 runs afoul of the full faith and credit clause of the U.S.

Constitution, Art IV, § 1, for the certification clause means that Michigan courts will not give full faith and credit to the laws of other states authorizing notaries public to take affidavits that are valid under the laws of those states without such certification. Indeed, § 2102 is also in contravention of the Hague Convention Treaty, at least the part of it devoted to the process of certification of notary signatures. TIAS 10072; 33 US Treaty Series (UST) 883; 527 UN Treaty Series (UNT) 189. This treaty mandates that each country honor any other country's process for certification of a notary signature (known as an apostille). No individual state, such as Michigan, can enforce laws which are in direct violation of a federal treaty. This statute also raises issues under the privileges and immunities clause, Art IV, § 2, for it undeniably discriminates against non-residence notaries public, whose acts must be certified to be received in a Michigan court, and in favor of resident notaries not subject to this same restriction. Clearly, one of the avowed purposes of the URAA is to avoid these constitutional perils by placing notarial acts performed outside of Michigan on the same footing as notarial acts performed within this State.

II

THE MAJORITY'S DECISION IN *APSEY II* WILL HAVE A DEVASTATING EFFECT ON THE ENTIRE PRACTICE OF LAW IN THE STATE OF MICHIGAN.

Attorneys in this State, required since 1994 to file affidavits of merit in support of medical malpractice cases, have viewed the URAA as providing, as it plainly says, an additional method of proving the validity of an out-of-state affidavit sworn before a foreign notary public, one that recognized that the authority, title and signature of the notary are evidenced by the signature and title of the notary subscribing the affidavit. They have read this URAA as obviating the need to obtain formal certification of that authority, title and signature, as required by MCL 600.2102, in order to present a valid affidavit of merit to the court in compliance with MCL 600.2912d. This is in conformance with the practice of lawyers in other areas of practice who regularly submit out-of-state affidavits in judicial proceedings. It is safe to say that the overwhelming practice of Michigan lawyers, in all walks of life, is to submit such affidavits so as to conform to the URAA, rather than the archaic, needless requirements of 2102.

Indeed, this interpretation of the URAA was not only that of plaintiff attorneys filing medical malpractice cases, but was one shared by a respected tableau of circuit court judges in this State. Apart from a single federal trial court decision insisting that an uncertified affidavit of merit was void (which did not consider the URAA on the question), and one or two other circuit court decisions, almost all the circuit court judges who have heretofore considered these statutes (we have a present list of 16 or 17) have found that the certification requirements of MCL 600.2102 are trumped by the clear and unambiguous provisions of the URAA. Even the circuit court judge who ruled otherwise in *Apsey*, and whose decision in that case was initially affirmed on appeal, in subsequent medical malpractice cases courageously repudiated his own prior *Apsey* decision as having been incorrectly decided. Some circuit court judges deemed the application of the URAA so clear and

compelling as to threaten imposing sanctions upon defense counsel for bringing before the court any motions based on § 2102.

Thus, the *Apsey* decisions came as both a surprise and a shock to everyone who had concluded that an out-of-state affidavit of merit need not be certified to be deemed valid in this State. The implications of these decisions are horrendous. If the majority decision in *Apsey* stands, and given retroactive effect, as is argued in Defendant's Claim of Appeal, then hundreds of medical malpractice cases pending in the courts of this State are at risk of being tossed out because of this technical objection to the affidavits of merit. Similarly, a large number of affidavits of meritorious defense, filed on behalf of medical malpractice defendants, will also immediately be rendered non-conforming. The ripple effect of the decision could also cast doubt upon all ongoing, and recently concluded, litigation in which out-of-state affidavits were submitted. Attorneys in all areas of practice might face liability for the mere act of believing that the URAA, and the weight of the circuit court decisions, were a reliable guide to their conduct in litigating their claims.

Although the *Apsey II* majority was careful in attempting to limit its decision interpreting the relative effects of MCL 600.2102 and the URAA to the area of medical malpractice affidavits of merit, nothing in the statute compels this limitation. Indeed, it is to be anticipated that the cautious practitioner would, from this point forward, automatically follow the rigorous requirements of MCL 600.2102, for fear that the affidavit would eventually become potentially actionable in judicial proceedings, and the affidavit would be found to be deficient absent such certification. Similarly, those opposing affidavits would feel pressure placed upon them to challenge the technical requirement of a certification any time an affidavit comes into play. This would work great mischief, and place a great burden, upon the effective administration of justice in this State, in this era of interstate, and indeed international, interdependence.

CONCLUSION

Based upon the foregoing arguments and authorities, the *amici curiae* State Bar of Michigan Negligence Section and the State Bar of Michigan Elder Law Section respectfully request that this Honorable Court reverse the majority decision in the case *Apsey v Memorial Hospital* (Exhibit B), and instead adopt the dissenting opinion, so as to hold that the provisions of MCLA 600.2102 are not the sole means of proving the authenticity of an out-of-state notarized affidavit, and that the provisions of the Uniform Recognition of Acknowledgement Act, MCLA 565.261, *et seq*, verify the authenticity of the affidavit of merit submitted by Plaintiff/Cross-Appellant.

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PROOF OF SERVICE

I certify that on August 17, 2005, a copy of the foregoing Motion for Leave to File Brief *Amici Curiae* Brief, Affidavit of David R. Parker, Notice of Hearing and Brief *Amici Curiae* on behalf of The State Bar of Michigan Negligence Section and the State Bar of Michigan Elder Law Section was served upon all attorneys of record in the above-entitled cause of action, at their business locations as disclosed by the pleadings of record herein, via the following:

☒ U.S. Mail ☐ Hand Delivery
☐ Facsimile ☐ Overnight Mail

I declare under penalty of perjury that the above statement is true to the best of my knowledge, information and belief.

Mary Bergsma